No. 15026

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL; ITS AGENT, NATHAN FLEISHER; AND LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENTS.

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Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL; Its Agent, Nathan Fleisher; and Los Angeles County District Council of Carpenters,

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BRIEF FOR RESPONDENTS.

This case is before the court upon the petition of the National Labor Relations Board for the enforcement of an order entered by it on August 26, 1955. The petitioner, hereinafter referred to as the Board, invokes the jurisdiction of this court under the provisions of Section 10(e) of the National Labor Relations Act, as amended. (61 Stat. 136, 29 U. S. C. A., Sec. 160(e).) The Board's order is purportedly issued under Section 10 of that Act. (61 Stat. 136, 29 U. S. C. A., Sec. 160.) The Board's decision and order upon which these proceedings are predicated is reported in 113 N. L. R. B. No. 123.

Statement of the Case.

Upon charges filed by Sand Door and Plywood Company, Los Angeles, California, a wholesale jobber of building materials, the General Counsel of the Board issued a complaint, which in substance alleged that Respondents since on or about August 17, 1954 instructed the employees of a building contractor named Havstad and Jensen to refuse to install certain doors because Respondents' rules and by-laws prohibit the installation of products not bearing the union label of the United Brotherhood of Carpenters and Joiners of America, AFL, or an affiliate thereof. [R. 1-2, 5-6.] By this conduct, it is alleged, Respondents have induced and encouraged the employees of Havstad and Jensen, in the course of their employment, to refuse to handle or work on certain doors, the object being to force Havstad and Jensen, and other employers, to cease doing business with the charging party and Paine Lumber Company of Oshkosh, Wisconsin. These acts, it is alleged, constitute unfair labor practices within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act, as amended. (29 U. S. C. A., Sec. 158(b)(4)(A).) The Respondents' answer to this complaint denied the commission of the unfair labor practices alleged and affirmatively averred that the Board lacked assertable jurisdiction over the subject matter of the complaint and the persons of the Respondents.

Sand Door and Plywood Company, the charging party, hereinafter referred to as Sand, is a California corpora-

tion, and has an arrangement with Paine Lumber Company of Oshkosh, Wisconsin for the distribution in Southern California of doors obtained from Paine. There was no labor dispute between Sand and its employees, Sand's intermediary, Watson & Dreps, and their employees, or Paine and its employees. Nor does the record show that Respondents have had any relationships with any of these three concerns. [R. 168-169, 170-171.]

In 1953, Sand received from Paine materials, including doors, valued at $185,796.85, no part of which had any connection with the instant controversy. In 1954, Sand received from Paine materials, including doors, valued at $103,503.05, which were shipped by Paine to various points in the state of California, among which was an item of approximately $9,000.00 [R. 198], being doors purchased by Watson and Dreps, a partnership, who took delivery at Sand's warehouse. The record does not show what Watson and Dreps did with these doors. [R. 171-173, 174.]

Havstad and Jensen, joint venturers, in 1952 began the construction of a hospital and other buildings for the College of Medical Evangelists, in the City of Los Angeles, California. In mid-August of 1954, 398 doors were delivered to the hospital building site, but the record does not reveal how they got there or from whence they came. [R. 187-188, 193.]

Havstad and Jensen, as building contractors, were parties to a Master Labor Agreement [R. 193-195], negotiated in their behalf by the Building Contractors Asso-

ciation, and the United Brotherhood of Carpenters and Joiners of America, for its affiliated District Councils and Local Unions in Southern California [R. 195-196, 197, 201-204.] This agreement governed the wages and working conditions of the employees of Havstad and Jensen. [R. 201-204.] Among the conditions of employment created by this agreement was a provision that, *"Workmen shall not be required to handle non-union material."* [R. 203.] By the express terms of this agreement, the parties covenanted that they would take no action, by any means whatsoever, "that will prevent or impede . . . the full and complete performance of each and every term and condition hereof." [R. 203-204.]

Arnold Steinert, Havstad and Jensen's foreman, at this building site, whose duties involved the assignment and supervision of work performed by the carpenters and laborers at this location, and who was in charge of the operations in connection with James Nicholson, the general superintendent for Havstad and Jensen [R. 105-106] on August 17, 1954 carried out his usual functions. In the normal course of the work, the employees report for work at 8:00 A.M., but Steinert, as foreman, usually arrives ahead of the employees and lays out his work plans for the day and assigns the various employees to the tasks he has selected for them. After the delivery of these doors in question, Steinert instructed the laborers of Havstad and Jensen to distribute these doors to the various floors of the building, preparatory to their

being "hung" by a carpenter, by the name of Sam Agronovich. About the same time, Steinert instructed Agronovich to begin the necessary preparations.

From the beginning of work done that day (8:00 A.M.), until after 11:00 A.M., Steinert was the only official of Havstad and Jensen present at this building site and was then in sole charge of all the employees [R. 131-132]. Shortly before 11:00 A.M., of that day, Nathan Fleisher, business agent of Respondent Carpenters' Local 1976, came to the building site and met Steinert in the lobby of the building and told Steinert that the doors were non-union and that "We'd have to quit hanging the doors until it was settled." The laborers, pursuant to Steinert's previous instructions, were, at the time, moving the doors from floor to floor, and Steinert instructed them to cease the distribution. [R. 164-165.]

Steinert then went to where Sam Agronovich was working and instructed Agronovich to discontinue the preparatory work, as the doors appeared to be non-union, and assigned Agronovich to other duties. After that, Steinert went on with his work, "going around to check on the work progress of the other employees under his supervision." [R. 165-166.] Fleisher, the business agent of Respondent Carpenters' Local 1976, took no part in any of these attendant conversations or instructions by Steinert. [R. 167-168.]

Nicholson, the general superintendent, reported on the job about thirty minutes after the above occurrence, learned what had happened, and went to the job site

looking for Fleisher and found the laborers were waiting for Steinert to assign them to other duties. [R. 113-116, 136.] Nicholson then went directly to Fleisher [R. 132] and asked him why he had stopped the men from hanging the doors. [R. 133-134.] Fleisher said he had taken this action so that it could be determined whether the doors were union or non-union. Nicholson admittedly lost his temper and ordered the employees to "pick up their tools," the equivalent of discharge, but upon calmer reflection directed that Sam Agronovich be assigned to other duties. All other carpenters continued in the performance of tasks previously assigned to them by foreman Steinert. [R. 118, 135.] Neither Nicholson nor Steinert assigned or attempted to assign any of the other carpenters to the duty of hanging doors. [R. 135.]

James C. Barron, vice-president of Sand, later learned that the hanging of the doors had been stopped and telephoned to Earl Thomas, secretary of Respondent District Council, asking "what the story was regarding the hanging of the doors" and was told by Thomas that he intended to ascertain if the doors were union made, and would advise Barron of his discovery. [R. 177-178.] The following day Thomas advised Barron that the doors were not union made and informed Barron that carpenters could not hang non-union doors. Thomas attempted to persuade Barron to have his company deal in union products and sought to work out a plan whereby the doors could be installed and future installation could be made on conformance with the provisions of collective bargain-

ing agreements that prohibited employees from handling non-union materials. Barron declined to cooperate in these suggestions. [R. 178-180, 186, 191.]

Sand next filed the instant charges and the Board sought an injunction in the United States District Court for the Southern District of California, which was denied. During the hearing in that matter, the judge observed that only one person had been stopped from hanging the doors and that no other carpenters had been assigned to such tasks or requested to do so. The day following this observation, at the instance of Sand, Nicholson, Havstad and Jensen's general superintendent, and a member of the carpenters' union, and Steinert, as superintendent on the job, went to each carpenter, separately, and asked each if he "would be willing to hang the doors" and from each received a negative reply. [R. 136-150.] Havstad and Jensen did not request Local 1976 to furnish other men to hang these doors. [R. 150-153, 97.]

The Trial Examiner of the Board, who took and heard the evidence, recommended that the complaint be dismissed for the reason that the provisions of the Master Labor Agreement that "Workmen shall not be required to handle non-union materials" removed this type of duties from the course of employment, and hence there were no violations of the Act. [R. 26-28.]

ARGUMENT.

I.

The National Labor Relations Board Did Not Have Assertable Jurisdiction Over Respondents.

The National Labor Relations Board, acting under its policy making powers, in October, 1954, announced that it would assert jurisdiction only in cases which, in the future, met with certain monetary standards, would be subjected to the jurisdiction of the Board. (*Jonesboro Grain Dyeing Co.,* 110 N. L. R. B. 67.) The standards thus established for the assertation of Board jurisdiction provided that to meet these requirements an enterprise must annually receive directly in the commerce flow goods valued in excess of $500,000.00, or indirectly in the sum of $1,000,000.00, or ship annually goods valued in excess of $50,000.00 directly into interstate commerce. Other standards, not pertinent here, were also announced and established.

The evidence in this case shows that in 1953 Sand received in interstate commerce, from Paine, materials valued at $185,696.84 and from January 1, 1954 to September 8, 1954 Sand received, in commerce from the same source materials valued at $103,503.05. Of this latter amount, materials valued at $9,148.32 were procured by Sand for sale to Watson and Dreps. No other figures were offered with respect to this concern. No evidence was produced as to the size or monetary value of the construction project here involved.

It appears obvious that neither Sand nor Watson and Dreps businesses meet any of the jurisdictional standards established as above.

The Trial Examiner, upon the record, found that Havstad and Jensen were the primary employers and that the record was not sufficient to fit them into any of the established standards. He regarded and found Paine and Sand to be secondary employers and without attempting to measure either of them to the standards established, the Trial Examiner found that Respondent's activities had resulted only in a slight diminution of commerce. He, nevertheless, conjecturally projected his own created standards, and on that basis considered, "this is a sufficient predicate for the assertion of jurisdiction. . . ." [R. 21-22.]

The Board, however, disagreed with the Trial Examiner as to which constituted the "primary employer" holding, without evidentiary support, that Paine and not Havstad and Jensen was the primary "employer", without giving any reasons or pointing to any evidence to justify such conclusion. It was only by this arbitrary process that the Board could twist the factual expositions into a situation that ostensibly met its standard of a direct outflow in excess of $50,000.00. The Board, caught in the dilemma of not having evidence to support its conclusions, relies on the decision of this court in *Washington-Oregon Shingle Weavers' District Council,* 101 N. L. R. B. 1159, as enforced in 211 F. 2d 946. There the facts showed that a Canadian manufacturer of shingles shipped directly to the Sound Shingle Company, non-union materials which a strike of the latter interfered with shipments of the former. The Board states that "implicit in that finding was the further finding that the manufacturer was in the position of a primary employer." The implicitness of that finding seems to have escaped this court in its review of that case because the

court makes no mention of it or that the question was even considered by the court. In fact, there appears to have been no contest with respect to the Board's jurisdiction presented to the court in that case and hence this court's decision in that case is no authority for the propositions that Paine was the primary employer.

The Trial Examiner was correct in finding that Havstad and Jensen was the primary employer because he recognized from the evidence that there was a dispute between Respondents and Havstad and Jensen that involved a working condition prescribed by a collective bargaining contract by which Havstad and Jensen had bound themselves not to require their employees to work on non-union materials. [R. 203-204, 193-196, 197.] That, and that alone, was the genesis of this controversy and no amount of legal sophistry can make anything else of it. It was no more than an accident that Paine doors were the thing that pointed up the breach of the collective bargaining contract on the part of Havstad and Jensen when they sought to require their employees to do what they had previously legally agreed not to require. The process of collective bargaining is always designed to establish the rules under which employees accept employment and the employer to obtain the benefits of that employment. The requirement, freely accepted by Havstad and Jensen, that their employees were not to be required to work on non-union materials is as much a condition of work as wages, hours or other conditions of employment. Not only did Havstad and Jensen bind itself by this requirement to remove from the working conditions the necessity of employees working on non-union goods, they further agreed, to insure faithful performance of this contractual provision, that they were under no disability of any kind whether arising out of

the provisions of Articles of Incorporation, Constitution, By-laws, or otherwise, that would prevent them from fully and completely carrying out and performing each and all of the terms of the agreement, and further, that they would not by contract or by any means whatsoever take any action that would prevent or impede them in the full and complete performance of each and every term and condition of the collective bargaining agreement. [R. 203-204.]

Thus, when Respondents protested the violation of the bargaining compact, they were in direct dispute with Havstad and Jensen. The involvement of Paine was sheer mishap. Under this record we respectfully submit that the Trial Examiner's conclusion that Havstad and Jensen were the primary employers is cogently sustained by the record and that the Board erred in finding to the contrary.

The resolution of the question as to the primary employer is indispensable in the application of the mechanical and arbitrary rules of the Board with respect to the assertion of its jurisdiction. In *Jamestown Builders Exchange,* 93 N. L. R. B. 481, the Board promulgated a special rule to test the application of its jurisdiction in the so-called secondary boycott cases. That rule stated, in substance, that the Board would consider not only the operations of the primary employer but also the operations of the secondary employer to the extent the latter is affected by the conduct involved.

Unquestionably and admittedly, respondents had a bona-fide dispute with Havstad and Jensen as to the application of the collective bargain which removed from the working conditions any requirement to work on non-union materials. The Trial Examiner so found, upon the

evidence. We submit that upon this record he could have reached no other proper conclusion.

This being so, the application of the rule laid down in *Jamestown Builders* case clearly shows that it was improper, under the established Board standards, to assert jurisdiction here, for there was no evidence that Havstad and Jensen, Sand, or Watson and Dreps satisfied these standards. The extent to which Paine was affected was the sum of $9,148.32, and likewise, none of the standards are met. Applied in its proper perspective, *Jamestown Builders* reveals a case over which the Board, by judicial decision, has stated that it would not assert its jurisdiction. While there was evidence by which other jurisdictional standards could have been viewed, the Board in its decision did not consider them. [R. 52, footnote 9.]

Assuming, without conceding, that Paine was the primary employer, the assertion of jurisdiction is improper on yet another ground.

In a line of cases, generally referred to as the *Brooks* line cases (*Brooks Wood Products,* 107 N. L. R. B. 237; *C. P. Evans Food Stores, Inc.,* 108 N. L. R. B. 1651; *McDonald McLaughlin & Deane,* 110 N. L. R. B. 1340) the Board consistently has declined to exercise its jurisdiction where the seat of the controversy is twice removed from the commerce flow.

The majority of the Board, in neither its Decision and Order nor its brief before this court, denies the effect of these decisions and makes no attempt to distinguish them or to overrule their jurisdictional effects. Obviously, the rulings in these cases point upon the unassertability of jurisdiction here because in the instant matter Paine ships to Sand. Sand delivers to Watson and

Dreps and Watson and Dreps delivers to Havstad and Jensen. Identically with the *Brooks* case, the effect of the dispute with Havstad and Jensen is twice removed from the commerce flow, and under those cases and, to quote the Board, *"As the respondents' business is not once, but twice removed from interstate commerce the volume of their business is immaterial. . . . We believe that there is insufficient impact upon interstate commerce to warrant our exercise of jurisdiction here."* Dissenting members Peterson and Murdock adopt the view that jurisdiction should not have been asserted because the relationship of the ultimate purchaser, Havstad and Jensen, was so remote that it would not effectuate the purposes of the act to assert jurisdiction here.

There is yet a final reason why the exercise of jurisdiction in this case cannot be sustained. As we have pointed out, in the Brooks cases, the respondents, who in those cases were employers charged with violations of the act, being twice removed from the commerce flow were, upon jurisdictional grounds, free of those charges. While in the instant controversy, the respondents are labor unions with a dispute twice removed from the commerce flow, the Board asserts jurisdiction. As member Murdock points out in his dissenting opinion, this establishes a double standard: One, *when the respondent is an employer,* and one, *where a labor union is respondent.* Such arbitrary determination of the exercise of Board jurisdiction is discriminatory and does not afford to labor unions the equal protection and application of the law. There appears to be no justifiable reason why an employer twice removed from the commerce flow is discharged while a labor union occupying an identical position is prosecuted. We strongly urge that this discriminatory application of Board jurisdiction is neither supported

by the act or any congressional history. In short, it is an arbitrary and unreasonable exercise of power unfounded in law and cannot be condoned by this court.

Under the circumstances of this case, the Board was not warranted in the assertion of jurisdiction. (*NLRB v. Guy F. Atkinson Co.,* 195 F. 2d 141 (C. A. 9).)

II.

On the Record Considered as a Whole There Has Been No Violation of Section 8(b)(4)(A).

The essential elements of the proscription embodied in Section 8(b)(4)(A) are, (1) that a labor organization in the furtherance of a dispute with an employer, commonly referred to as the primary employer, (2) induced or encouraged *employees* of a "neutral" employer, (3) in the course of their employment, (4) to engage in a strike or concerted refusal to perform services for the "neutral" employer, and (5) where an object thereof is to cause one employer to cease doing business with another employer. (*Rice Milling Company v. NLRB,* 341 U. S. 665.) The objective of the union, while material, is alone not sufficient; it only becomes a violation when achieved in the manner specified in the statute. (*Rice Milling Company v. NLRB, supra; Joliet Contractors Ass'n v. NLRB,* 202 F. 2d 606, cert. den., 346 U. S. 824.)

A. There Was No Strike Within the Meaning of the Statute.

Section 501 of the Labor Management Relations Act (61 Stat. 136) defines a strike as a concerted stoppage of work by *employees* . . . and any concerted slowdown or other concerted interruption of operations by

employees. The broadest definition of a strike includes "quitting work" or "a stoppage of work." (*Glaziers' Union Local 27,* 99 N. L. R. B. 1391, 1392.) Here, the evidence shows that no employees "quit", but, on the contrary, there is ample evidence that none of the *"employees"* terminated or ceased their employment. Rather, the evidence is undisputed that, with a single exception, the employees continued to perform their assigned functions without interruption. A management representative instructed certain laborers to cease distributing the doors, which instruction was obeyed. If this idleness can be termed a work stoppage, it is clear that the cessation did not originate with the employees but was a direct result of managerial orders, as we will hereafter show.

B. Steinert Acted Solely as a Representative of Management When He Instructed Employees to Cease Their Work on the Doors.

The unique approach of certain members of the Board in concluding that there was a violation of the act, requires an examination of the evidence from which the Board concluded that Arnold Steinert, the foreman for Havstad and Jensen, was an agent of Respondents. The importance of this finding is apparent from the admission of the Board that it is proper for a labor organization to exert pressure against an employer to accomplish a boycott and in the further view that the Board has held that the collective bargaining contract, with its restrictive clause, that "workmen shall not be required to handle non-union material", is not *per se* violative of the act. Consonant with the position of the Board is the conclusion that had Fleisher's appeal to Steinert been an appeal to management no violation would have been found. In order for the Board to make this uniquely strained con-

struction stand up it was necessary for the Board to infer that Steinert was an agent of respondents and not a managerial actor. It is well settled that such an inference must be based upon the preponderant facts and that such a mere inference standing alone is without substance.

The Board relies solely upon the evidence which is found in the by-laws and trade rules of Respondent Council wherein it is stated that "foremen are to be held equally responsible . . . for the enforcement of all by-laws and trade rules of the District Council." The Board, in its brief, says that from this, "it is reasonable to conclude that Fleisher was invoking Steinert's obligation under the Union's rules and made him the union's agent for their enforcement." But the fallacy of this conclusion is that it is based upon nothing in the record which points to the rule as being the motivating factor which prompted Steinert's conduct. In a similar case and under like conditions, the Seventh Circuit, in *Joliet Contractors Ass'n v. NLRB,* 202 F. 2d 606, and the Board, in *Glaziers Union Local 27,* 99 N. L. R. B. 1391, both held that by-laws standing alone do not prove a motivating factor sufficient to sustain an agency theory. The Seventh Circuit pointed out that something more than the mere existence of by-law provisions were necessary; that there must be probative evidence that the actor was in fact following the dictates of such rules. There is, of course, no evidence that the by-laws and rules had anything to do with the action taken by Steinert. The Board seizes this rule as pointing up the culpability of Steinert and totally ignores the provision of the collective bargaining contract which expressly provides, *"that any provision in the working rules of the Unions, with reference to the relations between the Contractors and their employees, in conflict with the terms of this Agreement shall*

be deemed to be waived and any such rules or regulations which may hereafter be adopted by the Unions shall have no application to the work hereunder." [R. 204.]

Thus, the provision of the rules are not to reach the end which the Board decides, but it is the provisions of the contract that govern, not the working rules. With this waiver of the rules, established by written contract, Fleisher's appeal to Steinert could only have been based upon the collective bargaining restriction against employees handling non-union materials.

There is no dispute but that Steinert was a foreman in the commonly accepted sense, and that within the meaning of the Act he was a supervisor and not an employee covered by the provisions of the statute. (Sec. 2(3) and 2(11), 106, 123, 131-132, 139-140, 135, 162-164, 166.) Steinert was subordinate to James Nicholson, the general superintendent, and in Nicholson's absence Steinert was in full charge of the job. Steinert's normal functions consisted of laying out work plans for the day, assigning various employees to the work tasks and making periodic checks of the work progress by going to the various locations of employees, observing their work and progress and generally seeing that all employees were efficiently performing their assigned tasks. This Steinert did on August 17.

When Fleisher came to the building site on this date, the only representative of management present was Steinert. *Nicholson was absent.* There was no other representative of management present for Fleisher to appeal to. In the words of general superintendent Nicholson, Steinert was in complete charge of all operations. [R. 131-132, 137-138, 143.] Fleisher said nothing about the by-laws or trade rules; in fact, there appears that there

never was any conversation by anybody about the trade rules. Obviously, Fleisher's appeal was to management.

As further evidence that Steinert was not acting as an agent of Respondents or motivated by the trade rules was the first official action taken, and that was to stop the *laborers* from distributing the doors. Admittedly, Fleisher did not represent, nor was he speaking for the laborers. *The laborers are not covered by the trade rules of Respondent Council,* nor are they members of any labor union subject to those rules. [R. 158, 165.] The next official act taken by Steinert was to direct a carpenter to cease handling the doors. This was the same carpenter that Steinert had previously assigned to the task of making the preliminary arrangements to "hang" the doors. Thus we have a startling inconsistency. When Steinert assigned the carpenter to this task, Steinert was acting for management, but when Steinert directed the employee to cease that assignment and begin another one Steinert becomes an agent of Respondents.

It is uncontroverted in this record that Steinert was the authorized agent of Havstad and Jensen, to whom the employees looked to for instructions in the performance of their work and the assignment of their job tasks; it is abundantly clear that had the employees refused to follow the instruction of Steinert they would have been guilty of insubordination.

We submit that for the Board to ignore the proven managerial status of Steinert, in view of the undisputed evidence, and to find that he represented Respondents and thus induced a strike of employees he supervised is an unwarranted and unreasonable conclusion, and not supported by the substantial evidence on the record considered as a whole.

This being true, Respondents are not responsible for the acts of Steinert, and under the majority's admitted position, as expressed in its decision, there has been no inducement of employees by Respondent, an indispensable element of a violation of 8(b)(4) of the Act.

C. The Conduct of Respondents Does Not Amount to a Violation of Section 8(b)(4)(A).

Sometime in the morning of August 17, 1954, some doors were delivered to the above mentioned hospital site.

About 11:00 A.M. of that date Respondent Nathan Fleisher discovered the doors and observed that they did not appear to have a union label on them. Fleisher sought out Arnold Steinert, the job foreman, and the only representative of management present on the job, and told Steinert that the doors appeared to be non-union and that installation of the doors would have to be stopped pending an investigation to be conducted to determine whether the doors were union material. We have, we believe, conclusively shown that Steinert was a supervisor within the meaning of the Act, and also under the Act was an "employer" within the definition set forth in the statute of that term. We have also shown by the undisputed evidence that Steinert, in the absence of Nicholson, was in complete charge of the Havstad and Jensen employees.

Upon receiving this advice from Fleisher, Steinert, in his managerial capacity, and upon his own initiative, took two separate actions. First, he instructed the laborers to discontinue the doors distribution, and secondly he went to the only employee engaged in the door hanging process and instructed this employee to engage in other duties. Fleisher made no statements to the employees and did not participate in the issuance of Steinert's instructions to the

employees. It is also definitely established by the record that all carpenters, except the one engaged in the preparatory door hanging work, did not stop their work in any degree.

Havstad and Jensen were parties to and bound by a collective bargaining agreement whereby they had previously agreed not to require "workmen to handle non-union materials." Had Steinert not taken the action he did, but had insisted and instructed the employees to work on these admittedly non-union materials, he would have caused Havstad and Jensen to have breached their collective bargaining agreement. In giving this information to Steinert, Fleisher was merely carrying out his duty of seeing that the provisions of the collective bargaining agreement were obeyed by Havstad and Jensen management. It is significant that Fleisher did not, at any time, direct any of his remarks to any employees, but only to representatives of management. This episode, in the perspective of this record, cannot be held to amount to a concerted refusal to perform services. Employees cannot refuse to do that which they are instructed not to do by the properly constituted authority of management.

The Trial Examiner refused to find that Steinert was acting as a representative of Respondent Council. The Board disagrees principally, as it states in its decision, because ". . . there is in addition, no indication of the extent of Steinert's authority to act for his employer", a conclusion patently not supported by the record. Nicholson, the general superintendent, of Havstad and Jensen, testified without contradiction that in his absence Steinert was in charge. In the scene of these activities it appears without dispute that Nicholson was not present nor was he at the building site when Fleisher gave his information

to Steinert. By Nicholson's own words, Steinert was in charge and being in charge he was most certainly performing managerial functions. [R. 131, 143.]

1. The Collective Bargaining Agreement as a Defense to the Charges Alleged and Found.

Prior to the decision in this case the Board had uniformly held that where an employer had bound himself by the collective bargaining process not to require his employees to work on non-union materials the execution of such a provision did not amount to a violation of the secondary boycott proscription of the statute. In this the Board was strongly supported by the decision of the Second Circuit in *Conway Express v. NLRB,* 195 F. 2d 906, 912. In that case a collective contract had, in like manner, removed from the employment area any requirement to work on non-union goods. Charged by Conway of 8(b)(4)(A) violations (on which the Board had ruled against Conway), that court said:

> "The Union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle (Conways) shipments under the terms of the area agreement provision relating to cargo shipped by struck employees. Consent in advance to honor a hot cargo clause is not the product of the unions' 'forcing or requiring any employer . . . to cease doing business with any other person.'
>
> "Of course, the direct strike against petitioner himself is not a secondary boycott. The distinction between the primary and secondary employer for the purpose of the section is now well recognized."

This court, in the *Sound Shingle* case, *supra,* assumed the decision of the Second Circuit to be a proper statement

of the law with respect to the hot cargo phase, but did not apply it because the court found there was no agreement in the *Sound Shingle* case which had a provision removing hot cargo from the employment area. However, this court said that the Board had long recognized that where there were agreements, such as present here, "it would be a waiver of the employer's statutory protection against secondary boycotts", which the court thought was the correct principle of law to be applied.

Here two members of the Board seek to overrule the Second Circuit and the decision of this court. The four members hold that where an employer, at the request of a union agrees to boycott the goods of another employer there is no violation of Section 8(b)(4)(A) because there has been neither a strike nor inducement or encouragement of employees to engage in such conduct. Say these four members, "what an employer may be induced to agree to do at the time the boycott is requested, he may be induced to agree in advance to do by executing a contract containing a 'hot cargo' clause". The fifth member would hold such clause void. But at this point the members part company. Two members say that while such a contract is not against public policy and otherwise valid, the union may not approach the employees of the contracting employer and in accordance with the contract provisions induce those employees to observe the hot cargo provisions without engaging in a violation of the section of the statute here considered. Two other members hold that such a construction is destructive of the collective bargaining benefits and that it does not amount to a violation when the union agents inform the employees, for whose benefit the collective pact is executed, of the hot cargo provisions or attempts to have such employees abide by the rule thus established. The fifth member, Mr. Rogers,

emphatically refused to adopt the reasoning or conclusions of the other four, holding that such clauses are void as against public policy. Only because of his belief that such clauses are void did Mr. Rogers join the two members who held the union incapable of enforcing the contract through employee participation. He expressly rejected their reasoning.

We come then, abruptly, to the question of whether there is in fact a valid Board order, capable of enforcement, on this all important phase of the case. Two members holding the union incapable of enforcing the hot cargo provisions without involving a violation of 8(b)(4)(A), two holding diametrically to the contrary, and the fifth refusing to adopt the position of any of the other four. It would seem that under the well known rule of judicial decision, where a majority of a court or Board does not agree upon the disposition of a case or the important portion of it, there is no decision and hence no valid order is before the court for its consideration.

We submit that the dissenting opinion of member Murdock is the only logical and proper decision that can be reached in this case and we adopt by reference all of the arguments against the validity of the order which he presents.

We agree that it is illogical to conclude, as two members of the Board do, that it is legal and proper to adopt a hot cargo provision in a collective bargaining contract but that a union, party to such agreement, is barred by the statute from acquainting the employees benefited by the collective contract of the provision and requesting or commanding that such employees obey those provisions. The members who so held do not quarrel with the propriety of the union exerting pressure against the contracting em-

ployer to reach the same results. That, they say is permissible. But if the union tells its members about the provision and that results in the provisions of the contract being carried out, then the union has contravened the statute. This conclusion has been rejected by the United States Supreme Court. (See *Assoc. of Westinghouse Employees v. Westinghouse Corp.,* 348 U. S. 437.)

It is unquestionably the employees for whom the contract is reached. In the collective action which culminates into a contract under which the employee accepts employment and the terms by which the employer agrees to employ, where that collective contract speaks of the relationship, employer and employee are contractually defined. We urge that there is no difference in entering into an agreement that employees will not be required to work on non-union goods than there is that the employees will not be required to work under unsafe conditions, or that the employees will not be permitted to use certain types or makes of tools, either for reasons of safety or productivity. Such restrictive provisions are common in labor contracts. These provisions can and do result in "boycotting" the makers of those tools and cause the employer to refrain from dealing with those makers. Yet, it is not contended, and we doubt it will be, that such restrictive covenants amount to a secondary boycott. The point is that all of these are conditions of work. All of these matters are reasonably necessary for the peaceful relations of the employer and his employees and the enhancement of the productive effort. There is no difference between a requirement that the employer will not require productive efforts on non-union materials than that the employer will be required to pay wages or confer other working benefits to his employees. We suggest there is nothing improper in the insistence by a union that a contracting employer

obey the restrictions concerning the types and makes of tools, although that may, and has, resulted in not using those articles, or that the employer pay wages or perform other provisions of the collective action even though it may result in some supplier being unable to inject his offensive articles into the employment relation. Neither is there an impropriety in a union insisting in the obedience of any of the provisions of its collective contract.

The correctness of these conclusions is emphasized by still another provision of the collective contract. As we have previously stated, the employer has agreed that he would not, by contract or otherwise, put himself in a position where he violates any of the terms of the collective bargain. Havstad and Jensen, by this provision, *had a duty to determine prior to the delivery of the doors that such were union made,* or at least the doors and *the contract which they executed for obtaining the doors was in conformity to the promises and agreement of Havstad and Jensen not to take any action which would put them in a position to violate the contract's provisions.* To hold that a union, charged with the representation of employees, could not compel the contracting employer to obey his contract is foreign to any legal concept.

The plain fact is that a union would have been derelict in its duty to the persons it represents not to have completely informed its membership as to every clause in its collective agreement.

When Fleisher appealed to Steinert to stop the hanging of the doors, he was, manifestly, appealing to management to obey the contractual provisions. The fact that the working rules of Respondent Council and the restrictive provision of the contract were almost identical in terms with respect to work on non-union goods does not alter the proper conclusion that the union was not acting contrary

to the statute when Fleisher made his appeal to Steinert. The Board argues that Fleisher did not mention the contract provisions when he spoke to Steinert and that appears to be a fact. But the fact is also clear that he did not mention the working rules either. Persuasive authority has held that working rules standing alone do not amount to statutory violations. (*Joliet Contractors Ass'n v. NLRB, supra.*) That court held that the rule *may* furnish the inducement or encouragement for a strike or concerted refusal to perform services, but at least, until they have been shown by evidence to have done so, they are not contaminated with illegality. In this case, there is no evidence that the working rules were the motivating factor which resulted in the difficulty concerning the doors. A contrary conclusion without evidentiary support is a nullity.

We suggest the impropriety and illegality of Paine and Sand seeking to inject their product into an area which has contractually been foreclosed to them. We believe that for them to do so would be soliciting the breach of contract by Havstad and Jensen, a solicitation we believe to be contrary to law. We are not unmindful that in the struggle for existence, competition for markets becomes keen. We do know, however, of no rule which permits such competition to succeed by the inducement of violations of contracts of others in the competitive market. We suggest that the injection of Paine and Sand into a market for which they are not qualified is not afforded protection by the provisions of this statute. As mere interlopers they must accept the market as they find it and cannot complain because it has previously been contractually denied. Having engaged in illegal conduct, we believe it highly improper to grant them asylum under the secondary boycott provisions of the Act. This is es-

pecially true here where Havstad and Jensen have not only agreed not to require their employees to work on non-union materials, but where they have further agreed that they will not "by contract, or any means whatsoever, take any action that will prevent or impede (them) in the full and complete performance of each and every term and condition" of the collective bargaining contract.

The Board argues, with some petulance, that 8(b)(4) was intended to protect neutral employers because they are embroiled in a dispute not their own. But, manifestly, when an employer or person seeks to inject their offensive products into a market which has contractually been foreclosed to them, they cease to be neutral employers or persons and become not only directly involved, but are the prime motivation of the industrial dispute. By their actions, they seek and intend to promote breaches of collective compacts and to disrupt the tranquillity of previously stabilized industrial relations.

In dealing with the subject of 8(b)(4), this court, in the *Sound Shingle* case, quoted from the statements of Senator Taft, 93 Cong. Rec. 4198, in 2 Leg. Hist. L. M. R. A. 1107. A part of that quotation reads, *"If their conditions are not satisfactory,* then it is *perfectly lawful to encourage them to strike."* What could be more unsatisfactory conditions than where an employer and a union have agreed by contract not to require the workmen covered to handle non-union materials and then have that employer induced, by a party foreign to the contract, to breach his agreement and to require his employees to handle non-union materials. In other words, Havstad and Jensen agreed to remove from the conditions of work any requirement that their employees handle non-union materials. This was a working condition. In violation of the express provisions of their contract they unilaterally

sought to require the handling of non-union materials. Most certainly this sets up a situation visualized by Senator Taft, and one which the Senator stated that *"it is perfectly lawful to encourage them to strike."* This argument becomes more compelling when it is considered that Sand and Paine, through Sand, attempted to disrupt the peaceful relations between Havstad and Jensen by the injection of their non-union materials. It is most difficult to conceive that in taking this action Sand and Paine could remain aloof from the inevitable results of their generating a labor dispute and still be termed neutrals. Human conception is not so culpable.

The Board concedes that section 8(b)(4)(A) only proscribes a concerted refusal when it occurs in the course of the employees' employment, and, when an employer acquiesces in his employees' failure to perform certain tasks, he has ,in effect, taken the work out of this area. (Bd. Br. p. 18.) Havstad and Jensen not only by contract removed the handling of non-union materials from the work requirements, they expressly acquiesced in the cessation of the hanging of the doors. Under the Board's own interpretation, the proscription of the Act does not reach the conduct concerning which the Board complains.

Conclusion.

For the reasons set forth herein, it follows that the Board's petition for enforcement of its order should be denied and the court should set aside in full such order and decision.

Respectfully submitted,

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